video systems as well.[441] One way of doing so would be to employ exclusive arrangements between cable-affiliated satellite programmers and cable-affiliated open video system programming providers in order to foreclose access to such programming by open video system operators and unaffiliated open video system programming providers.

192. The record demonstrates that, under such circumstances, other open video system programming providers, including the open video system operator, might be unable to obtain access to sufficient programming to provide a viable service.[442] This could lead to a situation where unaffiliated programmers decline to seek access on the platform or where the open video system operator might decide against entering the video programming distribution market through the open video system model or might decide to choose to provide traditional cable service rather than open video system, thus scuttling Congress' goal in establishing open video system as a facilities-based competitor. Such concerns are reflected in the record. For example, the telephone industry's perception is that the success of the telephone company-affiliated open video system package may well depend on the telephone companies' ability to obtain popular cable-affiliated programming.[443] Thus the industry may choose not to develop open video system platforms if it cannot be assured of access to a reasonable amount of cable-affiliated programming.[444]

193. In adopting this rule, we recognize, as did Congress in enacting the program access provisions, that exclusive contracts can often have pro-competitive effects under certain market conditions. However, strategic vertical restraints can also deter entry into markets for the distribution of multichannel video programming. Accordingly, the Commission's program access policies seek to balance the likely competitive harm to consumers created by a particular vertical arrangement against its likely efficiency benefits. In the context of open video systems, we believe that, unless the Commission first determines that exclusive arrangements for satellite programming which favor cable-affiliated video programming providers are in the public interest under Section 628(c)(4), the potential for competitive harm from such contracts requires their prohibition. In reaching this conclusion, we have considered the record evidence of competitive harms that might flow from such arrangements, as well as Rainbow's arguments that such contracts can have pro-competitive benefits.[445] However, in light of the risk of competitive harm

[441]Communications Act § 653(c)(1)(A), 47 U.S.C. § 548(c)(1)(A).

[442]*See, e.g.*, NYNEX Comments at 20; National League of Cities, et al. Comments at 44.

[443]Tele-TV Reply Comments at 2, 5.

[444]*Id.* at 3. If a telephone company chose to develop a cable system rather than an open video system platform, the existing rules would ensure that it could not be prevented by exclusive agreements from obtaining access to cable-affiliated programming. Consumers are likely to suffer if telephone companies choose to forego open video systems because it is likely to take longer for LECs to obtain franchises to deploy cable systems and cable systems will not carry as many "distinctive voices" as open video systems would.

[445]Rainbow Comments at 28-30.

from such agreements, we believe it is appropriate to be guided by the balance struck by the 1992 Cable Act generally with respect to exclusive contracts which favor cable operators. Accordingly, we conclude that such arrangements should be prohibited unless the contract pertains to an area served by a cable operator as of the date of the enactment of the 1992 Cable Act and the Commission first determines that it is in the public interest in accordance with the factors set forth in Section 628(c)(4).

194. Similarly, as stated above, a satellite programmer may provide its own programming directly to subscribers by purchasing channel capacity on an open video system platform. It is therefore possible for a programmer vertically integrated with a cable operator, a common carrier or its affiliate that provides video programming directly to subscribers, or a different open video system operator, to purchase channel capacity, to provide its own programming directly to subscribers and to refuse to sell the programming it owns to another MVPD on the open video system. Such a refusal to sell would appear to be unreasonable because it discriminates against a class of distributors, i.e., open video system programming providers. Furthermore, this type of refusal to sell would result in the same situation which we have deemed contrary to the purposes of Section 628 when achieved through an exclusive contract, i.e., restricting competitive access to vertically integrated satellite cable programming to a vertically integrated entity. We believe this would consequently be actionable under Section 628(c).

(3) Benefits of Program Access Rules for Open Video System Programming Providers

195. As noted above, commenters in this proceeding have raised the issue of the extent to which video programming providers on open video systems are MVPDs, and therefore entitled to the benefits of the program access rules. Rainbow's claim, referenced above, that Congress limited the applicability of the program access rules to operators of open video systems, and that nothing in the 1996 Act suggests that programmers must provide their services to competing users of an open video system, would seem to indicate that Rainbow does not believe that video programming providers on open video systems are entitled to the benefits of the program access statute.[446] Although Rainbow argues that it will not be able to compete with other programmers on an open video system platform if Rainbow is forced to sell its programming to other MVPDs,[447] we believe that the statute and the program access rules should not be interpreted as Rainbow urges.

196. As discussed above in Section III.E.2., open video system operators and video programming providers that provide more than one channel of programming on an open video system are MVPDs. We will not create an exception to our rules that would exclude open video

[446]Rainbow Comments at 28.

[447]*Id.* at 29-30.

system operators or open video system programming providers from the benefits of our program access rules.[448] Accordingly, we will add a note to the definition of MVPD contained in Section 76.1000(e) of our rules[449] to indicate that video programming providers on open video systems that provide more than one channel of programming to subscribers are MVPDs.

(4) Expansion of the Program Access Rules

197. In addition, we decline to expand the program access rules as certain other commenters have requested. First, we decline to adopt NYNEX's assertion that open video system operators must have the right to insist that those using its system have the ability to obtain all programming on comparable, nondiscriminatory terms.[450] As discussed above, for example, we do not view the exclusivity provisions of the program access rules as prohibiting an open video system programming provider that is unaffiliated with a cable operator, a common carrier that provides video programming directly to subscribers, or an open video system operator from entering into an exclusive programming contract with a vertically integrated satellite programmer, although such a contract may be challenged under other appropriate provisions of the program access rules as unfair competition and discriminatory conduct. We also decline to extend the program access requirements for open video systems, as NYNEX and Tele-TV have requested,[451] beyond vertically integrated programming and satellite delivered programming.

198. Tele-TV also asks the Commission to clarify that national and regional programming that is delivered by satellite anywhere in the country is satellite programming for purposes of the program access rules. In this proceeding we are addressing program access issues only as they relate to open video systems and not the rules' general applicability. We therefore

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[448] *See* USTA Comments at 20.

[449] *See* 47 C.F.R. § 76.1000(e).

[450] *See* NYNEX Reply Comments at 15; *see also* Ex Parte Letter to William Caton, Acting Secretary, Federal Communications Commission, from Marie Breslin, Director, FCC Relations, Bell Atlantic Network Services, Inc. (May 3, 1996) at Attachment at 7 (program access rules should be extended to apply to all programmers, all programming, all delivery methods); Tele-TV Reply Comments at 3-15. *But see* MPAA Reply Comments at 9-11 (disagreeing with NYNEX's contention that open video system operators should be permitted to deny access to entities holding either exclusive rights to a programming service or favorable contract terms that effectively preclude others from distributing the program service on that open video system facility).

[451] *See* NYNEX Comments at 21; Tele-TV Reply Comments at 3-15. *But see* MPAA Reply Comments at 9-11 (opposing NYNEX's suggestion that exclusive arrangements involving non-satellite distributed programming should be foreclosed). We note, however, that certain commenters have alleged that vertically integrated programmers have threatened to circumvent the program access rules by delivering satellite programming by terrestrial means. *See* Ex Parte Letter from Marie Breslin, Bell Atlantic, to William Caton, Secretary, Federal Communications Commission (May 14, 1996) (referring to "regional non-satellite delivery"). In declining to explicitly extend the program access rules to non-satellite delivered programming, we do not foreclose a challenge under Section 628(b) to conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules and having to deal with competing MVPDs.

do not believe that this proceeding is the appropriate forum to decide this issue and decline to address it as TELE-TV requests. We may consider this request separately in a future proceeding.

4. Sports Exclusivity, Network Non-Duplication and Syndicated Exclusivity

a. Notice

199. Section 653(b)(1)(D) directs the Commission to prescribe regulations that "extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity (47 C.F.R. 76.67), network non-duplication (47 C.F.R. 76.92 et seq.), and syndicated exclusivity (47 C.F.R. 76.151 et seq.)."[452] These regulations allow the holders of certain exclusive rights to prohibit cable systems from carrying various sports, network and syndicated programming within specified geographic zones.[453]

200. In the *Notice*, we sought comment on how these regulations should be implemented in the context of open video systems. Specifically, we sought comment on how they should be applied to open video systems that cross multiple geographic zones or communities. We also sought comment on whether the open video system operator, individual video programming providers, or some other entity should be responsible for blocking programming and enforcing these provisions.[454]

b. Discussion

201. We believe that we can directly apply our existing cable regulations regarding sports exclusivity, syndicated exclusivity and network non-duplication to open video systems. First, we do not believe that open video systems that span multiple geographic zones or communities should be treated any differently than similar cable systems.[455] The record evidence indicates that large cable systems are able to comply with these provisions, and no commenter has provided any reason why open video systems should be required to comply with different regulations.[456]

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[452]Communications Act § 653(b)(1)(D), 47 U.S.C. § 573(b)(1)(D).

[453]47 C.F.R. §§ 76.67, 76.92-97 and 76.151, 153-159, 163.

[454]*Notice* at para. 46.

[455]Assn. of Local Television Stations Comments at 4, 11-12; NAB Comments at 11 (suggesting that open video systems be designed to permit compliance across multiple geographic zones); Telephone Joint Commenters Comments at 25.

[456]Cablevision Systems/CCTA Comments at 23; CBS Comments at 4-5; Community Broadcasters Assoc. Comments at 6; Alliance for Community Media, et al. Reply Comments at 8; Minnesota Cities Comments at 12; TCI Comments at 18-19; Time Warner Comments at 25. TCI Comments at 19 (arguing that LECs will have the

202. Second, we find that open video system operators should be responsible for compliance with these rules. We received various opinions as to which entity in the open video system context should be responsible for compliance.[457] Among those opposed to holding open video system operators responsible were the Telephone Joint Commenters who argued that video programming providers should be held legally responsible for compliance as to the individual video programming that they select.[458] We do not believe, however, that the fact that a video programmer has selected certain programming alone justifies holding that programmer responsible for compliance with our exclusivity rules.

203. We note that exclusive and non-duplication rights are protected under our rules by a prohibition against carriage (i.e. retransmission to subscribers) of affected signals to community units located within relevant geographic zones.[459] In the cable context, the cable system operator selects and controls the retransmission of all signals over its system. It is, as a practical matter, the only entity capable of deleting the affected signals when necessary.[460] In the open video system context, open video system operators will not select all of the programming that is retransmitted to subscribers. However, we believe that, like cable operators, open video system operators will have ultimate control over the retransmission to subscribers of signals over the system.[461] Therefore, we will hold open video system operators responsible for compliance with our sports exclusivity, network non-duplication, and syndicated exclusivity rules.

204. In all cases, we find that television stations must notify the open video system operator of the exclusive or non-duplication rights being exercised. As we stated above, the operator is ultimately responsible for compliance with these rules. We also believe that this is the most administratively efficient method for providing notice of these rights to an open video

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opportunity to "design their systems around these problems rather than having to implement the rules via existing systems.").

[457] *See* NYNEX Reply Comments at 13-14; Telephone Joint Commenters Comments at 25; USTA Comments at 19-20 (all arguing that responsibility for compliance should lie with the individual programmers) and Assn. of Local Television Stations Comments at 4, 10-11; U S West Comments at 19-20 (arguing that responsibility for compliance should lie with the open video system operator). NCTA also suggested the use of an administrator who would be responsible for compliance with our rules. NCTA Comments at 36-37; NCTA Reply Comments at 29-30.

[458] Telephone Joint Commenters Comments at 25

[459] 47 C.F.R. §§ 76.67, 76.92-.97 and 76.151, .153-.159, .163

[460] In fact, the definition of a cable system operator refers to one who provides cable services or "otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 C.F.R. § 76.5(cc).

[461] ABC suggests that because open video system operators control the wire just like cable operators, they should similarly be held at least partially responsible for compliance with our rules. ABC Comments at 11. We also agree with CBS that the open video system operator will most likely be in the best position to perform those acts necessary for compliance with these regulations. CBS Comments at 6

system.[462] In addition, we believe that when retransmission of affected signals is prohibited under these rules, video programming providers should be given an opportunity to either substitute signals or delete signals where possible. Therefore, we require that open video system operators make all notices of exclusive or non-duplication rights received immediately available to the appropriate video programming providers on their systems. We would not expect to impose sanctions on an open video system operator for violations of the exclusivity rules by an unaffiliated program supplier if the operator provided proper notices to the program supplier and took prompt steps to stop the distribution of the infringing program once it was notified of the violation.[463]

5. Other Title VI Provisions

a. Notice

205. Section 653(c)(1)(A) provides that any provision that applies to cable operators under the following Title VI provisions shall apply to open video system operators: (1) Section 613 (except for subsection (a)) (ownership restrictions); (2) Section 616 (regulation of carriage agreements); (3) Section 623(f) (negative option billing); (4) Section 631 (subscriber privacy); and (5) Section 634 (equal employment opportunity). In the *Notice*, we proposed to amend our rules to apply Sections 613 (except for subsection (a)), 616, 623(f), 631 and 634 to open video system operators, as required by new Section 653(c)(1)(A). We sought comment in the *Notice* on any issues raised by the application of these sections to open video system operators.[464]

b. Discussion

206. Given the lack of substantial comment on this subject and the plain language of the statute, the Commission will, as proposed in the *Notice*, apply the following provisions of the Communications Act and the Commission's rules thereunder to open video systems: Section 613 (c) - (h) regarding ownership restrictions; Section 616 regarding regulation of carriage agreements;[465] Section 623(f) regarding negative option billing;[466] Section 631 regarding

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[462]Assn. of Local Television Stations Comments at 10-11; CBS Comments at 5-6; NAB Comments at 11-12; NBA, et al. Comments at 2-3; NBC Comments at 16.

[463]*See* NAB Comments at 12 n.12.

[464]*Notice* at para. 62.

[465]*See* HBO Comments at 21 and NYNEX Comments at 20 (both supporting application of Section 616 to open video systems).

[466]National League of Cities, et al. commented that the negative option billing rules should be applied to open video systems without the exceptions created under cable rate regulation. National League of Cities, et al. Comments at 44-45. We believe that, in order to comply with the statutory mandate that the negative option billing requirements applied to cable operators be applied to open video system operators, as directed by Section 653, our

subscriber privacy; and Section 634 regarding equal employment opportunity.

6. Preemption of Local Franchising Requirements

a. Notice

207. While Congress applied the above Title VI provisions to open video system operators, Congress also provided that open video system operators would be exempt from several Title VI obligations. As described above, these exemptions were intended to afford open video system operators a reduced regulatory burden in exchange for providing access to unaffiliated programming providers on a non-discriminatory basis.[467] One of the Title VI exemptions is Section 621, which sets forth the local cable franchise requirements. In the comments, several parties raised the issue of the role of local authorities, in the absence of Section 621, to oversee use of the public rights-of-way. In addition, Section 653(c)(2)(B) provides that an open video system operator may be subject to the payment of fees on its gross revenues for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under Section 622.[468] The rate at which such "gross revenues fees" are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area.[469]

b. Discussion

208. We start with two basic premises. First, Section 653 exempts an open video system operator from the requirement of obtaining a local franchise under Section 621, although the operator still must pay a gross revenue fee "in lieu of" a franchise fee and must satisfy obligations under Section 611. Second, we believe that Congress did not intend to infringe upon local communities' prerogative to manage their rights-of-way in order to protect the public health and safety.[470] As the Conference Report stated:

> The conferees intend that an operator of an open video system under this part shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its public rights-of-way in a nondiscriminatory and competitively

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entire negative option billing rule should be applied to open video system operators. National League of Cities, et al. do not provide any rationale for us to conclude otherwise.

[467] *See* Communications Act § 653(c), 47 U.S.C. § 573(c).

[468] Communications Act, § 653(c)(2)(B), 47 U.S.C. § 573(c)(2)(B).

[469] *Id.*

[470] *See* NYNEX Reply Comments at 16-18.

neutral manner.[471]

209. We believe that Congress' intent is clear. State and local authorities may impose conditions on an open video system operator for use of the rights-of-way, so long as such conditions are applied equally to all users of the rights-of-way (i.e., are non-discriminatory and competitively neutral).[472] For instance, a state or local government could impose normal fees associated with zoning and construction of an open video system, so long as such fees was applied in a non-discriminatory and competitively neutral manner. Conversely, state and local authorities may not impose specific conditions on use of the rights-of-way that are unrelated to their management function or that apply to an open video system operator differently than they apply to other users of the rights-of-way.

210. We believe that most of the concerns raised by the Michigan Cities, et al. regarding their need to control use of the rights-of-way fall squarely within their legitimate management function. To use the examples of the Michigan Cities, et al., local authorities will retain their ability to address the following valid local concerns: (1) coordination of construction schedules, (2) establishment of standards and procedures for constructing lines across private property, (3) determination of insurance and indemnity requirements, and (4) establishment of rules for local building codes.[473] Similarly, the National League of Cities, et al. cites the following responsibilities of state and local governments, that we believe are consistent with nondiscriminatory and competitively neutral management of the rights-of-way: (1) scheduling common trenching and street cuts, (2) repairing and resurfacing construction-damaged streets, (3) ensuring public safety in the use of rights-of-way by gas, telephone, electric, cable, and similar companies, and (4) keeping track of the various systems using the rights-of-way to prevent interference among facilities.[474]

211. Any State or local requirements, however, that seek to impose Title VI "franchise-like" requirements on an open video system operator would directly conflict with Congress' express direction that open video system operators need not obtain local franchises as envisioned by Title VI.[475] Examples of such Title VI requirements include constructing institutional networks, donating money to local educational or charitable institutions, or specifying the amount or type of capacity that the system must possess. Such requirements are preempted because they

[471]Conference Report at 178

[472]*See* Telephone Joint Commenters Reply Comments at 30; Time Warner Reply Comments at 20-21. *See also* City of Olathe Comments at 14-15 (noting that local authorities retain their right to manage public rights-of-way in a non-discriminatory manner).

[473]Michigan Cities, et al. Reply Comments at 19-29

[474]National League of Cities, et al Comments at 53

[475]*See* Communications Act § 653(c)(1)(C), 47 U.S.C. § 573(c)(1)(C).

"stand[ ] as an obstacle to the accomplishment of the full purposes and objectives of Congress."[476]

212. We believe the most natural reading of Section 653, in light of Congress's stated intent, is that state and local governments cannot require any open video system operator to obtain a Title VI franchise from a state or local authority for use of public rights-of-way necessary to operate its open video system. The state or local government may, however, impose non-discriminatory and competitively neutral conditions or requirements that are necessary to manage the public rights-of-way.[477] Thus, we conclude that a state or local government requirement that directs an open video system operator to obtain a Title VI franchise to operate an open video system directly conflicts with Section 653 of the Communications Act and is therefore, preempted.[478]

213. In coming to this conclusion, we cannot agree with the argument of the National League of Cities, et al. that a local franchising requirement would not be in conflict with federal requirements because it will not always be impossible for an open video system operator to comply with both.[479] As we explained above, Section 653 explicitly states that the requirement that a cable operator obtain a franchise to provide cable service shall not apply to an open video system operator. Thus, any requirement that an open video system operator obtain a local franchise to operate an open video system would conflict with the statutory provision that such a requirement shall not apply. As the Court explained in *Louisiana PSC*,

> [p]reemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v Rath Packing Co.*, 430 U.S. 519 (1977), [or] when there is outright or actual conflict between federal and state law, e.g., *Free v. Bland*, 369 U.S. 663 (1962).[480]

214. Moreover, we believe that allowing state or local governments to require an open video system operator to obtain a Title VI franchise to operate an open video system stands as an obstacle to the accomplishment and execution of Congress' intent in enacting the open video system statutory provisions.[481] including Section 653.[482] Congress, through the open video system

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[476]*Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

[477]We set forth above specific examples of management functions that remain within the local authority's control. We also note that, as explained below, the state or local governments should manage the public rights-of-way in a nondiscriminatory and competitively neutral manner

[478]*See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Free v. Bland*, 369 U.S. 663 (1962).

[479]National League of Cities, et al. Reply Comments at 40-41 (arguing that "the two levels of law here are complementary, not contradictory").

[480]*Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

[481]*See* Communications Act §§ 651(a)(4), 653, 47 U.S.C. §§ 571(a)(4), 573.

provisions, sought to encourage the deployment of alternative video delivery systems as a way to bring competition to the video delivery market.[483] In so doing, Congress struck a balance between the open video system operator's editorial control and regulatory restrictions. Thus, although an open video system operator must cede editorial control over up to two-thirds of its system, Congress sought to induce entry by reducing an open video system operator's obligations under Title VI.[484] Indeed, the Conference Report specifically states that one reason for the reduced regulatory obligations is to encourage the deployment of open video systems and to "introduce vigorous competition in entertainment and information markets."[485]

215. We disagree with the National League of Cities, et al. that Congress merely intended to exempt open video system operators from the federal requirement for a local cable franchise, and that this exemption "has no effect whatsoever on any state or local requirement for right-of-way authorization."[486] The reading of the National League of Cities, et al. would render meaningless Congress' exemption of open video system operators from local franchising requirements under Section 621. Indeed, it could have the effect of actually increasing the local franchising burden on open video systems in relation to cable. For instance, while Section 621 requires a cable operator to obtain a local franchise, it also requires a local franchising authority to give the cable operator a reasonable period of time in which to become capable of serving all households in the franchise area.[487] Under the reasoning of the National League of Cities, et al. not only could a local authority impose such a build-out requirement on an open video system operator (a requirement unrelated to management of the rights-of-way), it could require an open video system operator to do so immediately, since the protections of Section 621 would no longer apply.

216. We also disagree with the argument of the National League of Cities, et al. that because it will not always be impossible for an open video system operator to comply with both a local franchising requirement and the requirements of Section 653, there is no "actual conflict"

[482]*See Jones v. Rath Packing Co.*, 430 U.S. 519, 543 (1977) (state statute is preempted when it would "prevent the accomplishment and execution of the full purposes and objectives of Congress"); *see also Hines v. Davidowitz*, 312 U.S. 52 (1941).

[483]*See* Conference Report at 177 ("The conferees recognize that telephone companies need to be able to choose from among multiple video entry option *to encourage entry*")(emphasis added).

[484]Communications Act § 653(c), 47 U.S.C. § 573(c); Conference Report at 178.

[485]Conference Report at 178.

[486]National League of Cities, et al. Reply Comments at 38-39.

[487]Communications Act § 621(a)(4)(A), 47 U.S.C. § 541(a)(4)(A).

between the two and thus preemption is inappropriate.[488] We do not believe that Section 653 preempts local regulation on the ground of physical impossibility. To the contrary, so long as local authorities exercise their managerial function in a non-discriminatory, competitively neutral fashion, we agree that local oversight is complementary, not contradictory, to the federal scheme. Instead, the preemption of a local franchise requirement is necessary to accomplish a federal statutory objective -- namely, the deployment of open video systems.

217. We disagree with the National League of Cities, et al. that this narrow preemption necessarily constitutes a "taking" under the Fifth Amendment.[489] First, with respect to LECs providing open video service over the same network they use to provide telephone service, there is inadequate evidence in the record for us to conclude that a "taking" has occurred. The National League of Cities,et al. has posited, without more, that the provision of video is beyond the scope of the LECs' state-granted authority to use the public rights-of-way to provide telecommunications services.[490]

218. Further, we find that Congress has provided "just compensation" to local authorities for use of the public rights-of-way.[491] Section 653(c)(2)(B) provides:

> An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental agency, in lieu of the franchise fees permitted under Section 622. The rate at which such fees are imposed shall not exceed the rate at which franchise fees are imposed on any cable operator transmitting video programming in the franchise area . .

219. It is undisputed that Congress enacted the cable franchise fee as the consideration given in exchange for the right to use the public ways.[492] It is apparent that the gross revenue

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[488]*See* National League of Cities, et al. Reply Comments at 40-41 (arguing that "the two levels of law here are complementary, not contradictory").

[489]National League of Cities, et al. Comments at 52-69

[490]National League of Cities, et al. Comments at 67-69. Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons. *See id.* at 55-56.

[491]*See United States v. Riverside Bayview Homes*, 474 U.S. 121, 128 (1985) (The Fifth Amendment does not prohibit takings, only uncompensated ones).

[492]*See* New York City Reply Comments at 13. In passing the 1984 Cable Act, Congress recognized local government's entitlement to "assess the cable operator a fee for the operator's use of public ways," and established "the authority of a city to collect a franchise fee of up to 5 percent of an operator's annual gross revenue." Committee Rpt. at 26 (see 1984 USCCAN at 4663).

fee "in lieu of" a franchise fee was intended as compensation by open video system operators for use of the public rights-of-way.[493] We therefore disagree with the National League of Cities, et al. that the statute contains "no mechanism" for providing just compensation.[494]

220. In calculating the gross revenues fee, the National League of Cities, et al. argue that, in order to treat cable operators and open video systems operators equally, the gross revenues fee should be applied to all open video systems revenues, including subscriber revenues and such non-subscriber revenues as carriage revenues and advertising revenues.[495] The Texas Cities assert that, in order to treat all programmers equally, the gross revenues fee should be applied to all programming on the open video system, including the programming of the open video system operator, its affiliates, and unaffiliated programmers.[496] NCTA states that the gross revenues fee should apply to the open video system operator's gross revenues from all channels on the open video system plus the gross revenues of the operator's video programming service.[497] Time Warner argues that the gross revenues fee should apply to all open video system revenues including revenues received from end users and revenues received from programmers.[498] We agree with those commenters that argue that the gross revenues fee should be based on the open video system operator's revenues from the system's operation. We therefore will apply the fee to all gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers. Gross revenues will not include revenues collected by unaffiliated video programming providers from their subscribers or advertisers, etc. - gross revenues will only include fees paid to the OVS operator. Consistent with our recent decision,[499] we will also require any gross revenues fee that the open video system operator or its affiliate collects from subscribers to be excluded from gross revenues.

221. We also disagree with the National League of Cities, et al. that this compensation is not "just" because they are able to recover additional compensation from cable operators beyond the maximum five percent franchise fee, and therefore the gross revenue fee does not represent fair market value for use of the rights-of-way.[500] As an initial matter, one of the

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[493] *See* Conference Report at 178; NYNEX Reply Comments at 17.

[494] National League of Cities, et al. Reply Comments at 42.

[495] National League of Cities et al. Comments at 45-46.

[496] Texas Cities Comments at 16-18.

[497] NCTA Comments at 35.

[498] Time Warner Reply Comments at 15-16.

[499] *See United Artists Cable of Baltimore*, Memorandum Opinion & Order, FCC 96-188 (April 26, 1996).

[500] National League of Cities, et al. Comments at 64-67.

principal forms of additional compensation obtained by local authorities consists of "channel capacity . . . designated for public, educational, or governmental use, and channel capacity on institutional networks," as recognized in Section 611, and Congress has provided in the OVS provision that "section 611 . . . shall apply" in accordance with regulations prescribed by the Commission. In any event, the gross revenue fee, by itself, constitutes "just compensation" due the local authorities in exchange for the use of public rights-of-way. The Supreme Court has repeatedly held that "'[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken.'"[501] That principle is embodied in the "before and after" test applied in partial takings cases, under which the measure of compensation is the difference between the value of the property before a partial taking and the value of the remainder of the property after the partial taking. For example, in *United States v. 8.41 Acres of Land*, 680 F.2d 388, 391 (5th Cir. 1982), which involved the taking of an easement for a pipeline, the court held that "[w]hen the property interest taken from a parent tract is merely an easement, the proper measure of damages is still the before-and-after method of valuation, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement." Thus, in valuing the compensation due for the taking of an easement for an open video system operator to string its wires over public rights-of-way, the proper measure is the decrease in the value of the public rights-of-way if they are crossed by an additional wire.[502] The local authorities have not attempted to argue that, after an open video system's wires are strung, their property will be worth less than before those wires are strung, and it would appear that any loss in value would be de minimis. Thus, the fee in lieu of a franchise fee will more than adequately compensate local authorities.

222. We also disagree with the National League of Cities, et al. that *Bell Atlantic v. FCC* requires a different result.[503] In *Bell Atlantic*, the D.C. Circuit declined to construe Section 201(a) of the Communications Act as authorizing the Commission to order physical co-location of a competitor's equipment on a local exchange carrier's property, where "virtual" co-location would achieve the same result without a physical invasion of the local exchange carrier's property.[504] Here, by contrast, Congress expressly directed the Commission to permit open video systems to operate without a local franchising requirement in exchange for a fee.[505] The Commission cannot achieve the same result that Congress intended by permitting local authorities

[501] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 319 (1987), quoting *United States v. Causby*, 328 U.S. 256, 261 (1946).

[502] Of course, in the case of LECs it may not even be necessary to string additional wires in some places, but merely to use or replace existing wires to deliver video as well as telephone service.

[503] *See Bell Atlantic v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[504] *Id.* at 1445-46.

[505] Telephone Joint Commenters Reply Comments at 34-35 n.93.

to exercise franchise or franchise-like authority over open video system operators.[506]

F. Information Provided to Subscribers

1. Notice

223. In the *Notice*, we sought general comment on how to interpret and implement the various provisions of Section 653(b)(1)(E).[507] Section 653(b)(1)(E)(i) directs the Commission to prescribe regulations that prohibit an open video system operator:

> from unreasonably discriminating in favor of the operator or its affiliates with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming on the open video system, or in the way such material or information is presented to subscribers.[508]

In addition, according to Sections 653(b)(1)(E)(ii) and (iii), the Commission must establish regulations that require an open video system operator to ensure that video programming providers or copyright holders (or both) are able "suitably and uniquely to identify their programming services to subscribers," and, further, that an open video system operator will not change or alter any such identification that is transmitted as part of the programming signal.[509] Finally, Section 653(b)(1)(E)(iv) directs that the Commission prescribe regulations that prohibit an open video system operator from "omitting television broadcast stations or other unaffiliated video programming services carried on such system from any navigational device, guide or menu."[510]

2. Discussion

a. Program Selection

224. Because the 1996 Act prohibits an open video system operator from omitting television broadcast stations or unaffiliated video programming carried on the system from any navigational device, guide or menu, we agree with Viacom that this demonstrates that Congress recognized the importance of inclusion on such devices in order to facilitate competition, and that Congress envisioned that a single navigational device would be employed by subscribers using

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[506] *Id.*

[507] *See Notice* at paras. 47-51.

[508] Communications Act § 653(b)(1)(E)(i), 47 U.S.C. § 573(b)(1)(E)(i).

[509] Communications Act § 653(b)(1)(E)(ii)-(iii), 47 U.S.C. § 573(b)(1)(E)(ii)-(iii).

[510] Communications Act § 653(b)(1)(E)(iv), 47 U.S.C. § 573(b)(1)(E)(iv).

the open video system.[511] Therefore, in the discussion below, we assume that a single navigational device will be used by subscribers to select programming carried on the open video system. However, if in practice, subscribers to an open video system are able to employ multiple navigational devices to select programming provided by various programmers on the open video system, we may need to reexamine our rules in this area and tailor them accordingly.

225. We believe, as stated in the *Notice*, that Section 653(b)(1)(E)(i) is intended to be a specific application of the non-discrimination requirement contained in Section 653(b)(1)(A).[512] Specifically, we believe that this provision is meant to ensure that an open video system operator does not favor itself or its affiliates in its interaction with the customer at the point of actual program selection (i.e., when the subscriber is choosing a particular channel to watch). The type of "material or information" that therefore would fall within the scope of Section 653(b)(1)(E)(i) includes navigational devices, guides (electronic or paper) and menus used by the subscriber to actively select programming.[513]

226. We agree with commenters that this means that the open video system operator may not discriminate in favor of affiliated programming by, for example, "burying" unaffiliated programmers in difficult to access portions of electronic guides, navigational devices or menus, or by otherwise placing affiliated programming in more prominent positions on the electronic guides, navigational devices or menus.[514] We believe that limiting the scope of Section 653(b)(1)(E)(i) to material or information that a subscriber would employ in the actual channel selection process comports with Congress' intent.

227. As we stated in the *Notice*, Section 653(b)(1)(E)(i), if read broadly, could impede an open video system operator's advertising of its affiliated programming service, since any such advertising presumably would be intended to encourage subscribers to "select" its affiliated video programming service.[515] We agree with the State of California and NYNEX that Congress did

[511]Viacom Comments at 17-18.

[512]*See Notice* at 48; *see also* State of California Comments at 11; NYNEX Comments at 24.

[513]CBS states that "material and information" used to "select programming" in Section 653(b)(1)(E)(i) encompasses programming guides (electronic or paper) and the way such guides and other navigational devices present information to subscribers. CBS Comments at 12. *See also* HBO Comments at 14.

[514]Of course, such a requirement would also apply to PEG and broadcast channels. *See* Alliance for Community Media, et al Comments at 35 (PEG channels must receive the same protections as other programming against discriminatory placement on menus or navigational devices, should be easily accessible); CBS Comments at 13 (the Commission should prohibit OVS operators from making identification and location by consumers of broadcast channels more difficult; State of New Jersey Division of the Ratepayer Advocate Comments at 3-4 (open video system operators must not discriminate against PEG channels in terms of programming information provided to subscribers).

[515]*See Notice* at para. 48.

not intend Section 653(b)(1)(E)(i) to hinder general advertising by an open video system operator of its affiliated programming service.[516] Such a result could deter the deployment of open video systems and would contravene Congress' overall objective of creating competition and maximizing consumer choice in the video marketplace.[517] Thus, for instance, to the extent that an open video system operator uses billing inserts to advertise its service generally, rather than providing inserts as a guide to program selection, we believe that such inserts fall outside the scope of Section 653(b)(1)(E)(i). We do not agree with NYNEX, however, that this Section was intended to refer solely to information provided by an open video system operator through its open video system.[518] For example, we believe that a paper programming guide that is intended to be used at the point of actual channel selection would also be governed by Section 653(b)(1)(E)(i).

228. While ABC agrees that Congress did not intend Section 653(b)(1)(E)(i) to hinder advertising by the open video system operator of its affiliated services, ABC states that the open video system operator should not be able to use the navigational device or menu to advertise affiliated programming, and should only be able to use billing inserts and other forms of off-system advertising if unaffiliated video programming providers have access to the open video system operator's subscriber lists.[519] We agree that Section 653(b)(1)(E)(i) prohibits the open video system operator from unreasonably discriminating in favor of its affiliated programming by means of discriminatory use of on-system advertising, if that advertising is contained in any channel selection guide, aid or menu. Accordingly, an open video system operator may not use its position as controller of a navigational device or menu to advertise its programming on the navigational device or menu, while at the same time disallowing unaffiliated programming providers comparable opportunities to advertise on the navigational device or menu.[520]

229. However, we disagree that Section 653(b)(1)(E)(i) requires that unaffiliated providers be given the open video system operator's subscriber list if it engages in off-system advertising. As discussed above, we believe that general off-system advertising will usually be beyond the scope of Section 653(b)(1)(E)(i) because it will not be used by subscribers at the point of program selection. In addition, Section 653(b)(1)(E)(i) requires that the material or information be provided to "subscribers." Thus, newspaper advertisements, for instance, which would reach both subscribers and non-subscribers alike would therefore fall outside the

[516]*See* State of California Comments at 10; NYNEX Comments at 24.

[517]*See* Conference Report at 178

[518]*See* NYNEX Comments at 25-26 (arguing that this Section was should only apply to advertising by an open video system operator through its open video system).

[519]ABC Comments at 14-15.

[520]*See* HBO Comments at 19 (an open video system operator must allow for "equal time, space and access" for ads on navigational devices and paper program guides). *See also* Assn. of Local Television Stations Comments at 7-8 (navigational devices should not favor the owner-competitor).

parameters of Section 653(b)(1)(E)(i).

230. We concur with HBO that Section 653(b)(1)(E)(iv) "prohibits the *actual* omission of programming from any navigational device, guide or menu while Section 653(b)(1)(E)(i) prohibits the *effective* omission of programming through such things as menu placement and searchability."[521] In addition, we agree with ABC that requiring an open video system operator to list on its electronic menus every program available (whether actually subscribed to or not) could "clutter" the menu.[522] Rather, as suggested by ABC, we find that menus offered by the OVS operator may inform the viewer that other services (that the consumer has not ordered) are available on the open video system, and direct the subscriber how to access a second screen with more complete information on those other services.[523] In addition, for programming to which the consumer has actually subscribed, we agree with HBO that no programming service on the open video system operator's navigational device should be more difficult to select than any other programming service.[524] We find that this requirement strikes a balance between the prohibition in Section 653(b)(1)(E)(iv) against omitting television broadcast stations or other unaffiliated programmers "carried on such system," and the practical considerations involved in listing all services available.

231. We agree with Viacom that an open video system operator is not relieved of the non-discrimination provisions of Section 653(b)(1)(E)(i) if the operator offers a navigational device that works only with affiliated video programming packages.[525] As Viacom notes, Section 653(b)(1)(E)(iv) prohibits the omission of broadcast stations or other unaffiliated programming services from any open video system navigational device.[526] In addition, we disagree with Tele-TV that open video system affiliated programming providers are not subject to the non-discrimination requirements regarding the provision of navigational devices.[527] The open video system operator should not be able to evade its obligation to ensure that other non-affiliated programming providers are represented on a navigational device, guide or menu simply by having the service nominally provided by its affiliate.

232. Finally, Viacom and Starsight raise the issue of navigational devices that are not provided by the open video system operator, generally arguing that the open video system

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[521] *See* HBO Comments at note 20 (emphasis in original)

[522] ABC Comments at 15-16

[523] *Id.*

[524] HBO Comments at 15-16

[525] Viacom Reply Comments at 9

[526] *Id.* at 10.

[527] Tele-TV Reply Comments at 20-21.

operator must allow other navigational device providers competitive access to the open video system.[528] EIA states that the competitive availability requirements of Section 629 of the 1996 Act and the equipment compatibility requirements of Section 624 of the 1996 Act should apply to open video systems.[529] The issues of the commercial availability of navigational devices and equipment compatibility are beyond the scope of this proceeding and will be addressed in a separate proceeding.

b. Program Identification

233. Section 653(b)(1)(E)(ii) provides that the Commission must establish regulations that require an open video system operator to ensure that video programming providers or copyright holders (or both) are able "suitably and uniquely to identify their programming services to subscribers;" Section 653(b)(1)(E)(iii) provides that an open video system operator will not change or alter any such identification that is transmitted as part of the programming signal.[530] We are codifying the statutory language of Sections 653(b)(1)(E)(ii) and (iii) in our rules adopted herewith.

234. However, we decline to adopt the suggestion of HBO and ABC that the "suitable and unique" identification requirement should apply not only to the programming signal, but also to the navigational device and menu of the open video system operator.[531] ABC argues that the open video system operator's menu should be required to carry not only the name of the video programming provider, but also the provider's logo or branding device.[532] HBO states that unique brand information must be part of the program display and must appear within the navigational device.[533] An open video system operator is required to transmit a video programming provider's identification only if it is transmitted "as part of the programming signal." Since an open video system operator's menu typically would not be transmitted as part of the unaffiliated video programming provider's signal, the statute only requires that the open video system operator ensure that the provider can "suitably and uniquely" identify its programming to subscribers. We find that the "suitable and unique" identification requirement would be satisfied if an open video system operator's navigational device included a provider's name (broadcast station call letters

[528]Viacom Comments at 17-20; Starsight Reply Comments at 1-5.

[529]*See* EIA Reply Comments at 7-8. *See also* Info. Tech. Indus. Council Reply Comments at 7-8 (open video system operators should be subject to the requirements of Section 629 of the Communications Act); Tandy Comments at 4-5 (if cable companies are allowed to become open video system operators, the Commission should apply Sections 624(A) and 629(a) to such companies).

[530]Communications Act § 653(b)(1)(E)(ii)-(iii), 47 U.S.C. § 573(b)(1)(E)(ii)-(iii).

[531]*See* ABC Comments at 15; HBO Comments at 17-18.

[532]*Id.*

[533]*Id.*

and network affiliation, for example), but not its logo or branding device. A requirement that the open video system operator's navigational device, guide, or menu also include logo or branding information would be beyond the scope of the statute and would unnecessarily limit the open video system operator's reasonable discretion to design its system in its own non-discriminatory way.[534] However, if the open video system operator chooses to prohibit unaffiliated providers' logos or branding information on its navigational device, guide or menu, it would similarly have to prohibit its own logo or branding information under Section 653(b)(1)(E)(i).

G. Dispute Resolution

1. Notice

235. In the *Notice*, we sought comment on how the Commission should implement Section 653's dispute resolution provision.[535] In particular, we sought comment on whether we should model our open video systems dispute resolution procedures after the ones the Commission employs to resolve program access disputes.[536] We also sought comment on whether we should promote the use of informal procedures, such as alternative dispute resolution ("ADR") mechanisms, which would require or encourage parties to attempt first to resolve a dispute without the Commission's direct involvement.

2. Discussion

236. Given the short 10-day period in which the Commission must approve or disapprove a certification request, we believe that the dispute resolution process will play a key role in ensuring the success of the open video framework. We agree with USTA that the assurance of Commission action within 180 days, combined with the risk of carriage awards and/or damages, will act as a substantial deterrent to potential rule violations.[537]

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[534] *See* Viacom Comments at 9.

[535] *Notice* at para. 72. Section 653(a)(2) provides

> The Commission shall have the authority to resolve disputes under this section and the regulations prescribed thereunder. Any such dispute shall be resolved within 180 days after notice of such dispute is submitted to the Commission. At that time or subsequently in a separate damages proceeding, the Commission may, in the case of any violation of this section, require carriage, award damages to any person denied carriage, or any combination of such sanctions. Any aggrieved party may seek any other remedy available under this Act.

[536] *Notice* at para. 72. *See* 47 C.F.R. § 76.1003.

[537] *See* USTA Comments at 11. *See also* Telephone Joint Commenters at 33; Alliance for Public Technology at 8.

237. In order for the Commission's review to be as efficient and thorough as possible, we adopt our suggestion in the *Notice* to model our open video system dispute resolution process -- except for must-carry complaints and petitions for special relief[538] -- after our rules governing program access disputes.[539] Thus, in order to file a complaint under Section 653(a)(2), we will require that a video programming provider or other complainant first notify an open video system operator of its belief that a violation of our rules has occurred, providing sufficient specificity so that the operator can determine the precise nature of the dispute.[540] At a minimum, the complainant must provide a potential defendant with ten days to respond to the notice. If the parties cannot resolve the dispute, the complainant may file a complaint with the Commission along with evidence (an affidavit or copy of a certified letter) that the required notice has been given.[541] Failure to include such evidence shall result in immediate dismissal of the complaint.

238. We will seek to dispose of as many cases as possible on the basis of a complaint, answer and reply. Parties should include all relevant evidence, including documentary evidence such as rate cards and programming contracts, in the complaint and answer to support their claims.[542] Any documents submitted may be protected as proprietary pursuant to Commission rules.[543] Discovery will not be permitted as a matter of right, but on a case-by-case basis as deemed necessary by the Commission staff reviewing the complaint.[544] Any complaint filed pursuant to Section 653(a)(2) must be filed within one year of the date on which the open video system operator's actions allegedly violated Commission rules.[545]

239. We believe that our adoption of this dispute resolution process will allow for the expedient resolution of complaints while adequately protecting video programming providers and others from discriminatory, anticompetitive, or otherwise improper conduct. We have not created a general standard that a complainant in an open video system dispute must meet in order to meet its burden of proof. Since open video system disputes may involve wide-ranging and novel issues, we do not believe that a single standard of proof is possible. Moreover, separate standards

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[538] *See* New Section 1506(o) of the Commission's rules.

[539] Various commenters supported the use of the program access dispute resolution procedures. *See* Assn. of Local Television Stations Comments at 10, 17; Telephone Joint Commenters Comments at 32-33; NYNEX Comments at 29.

[540] 47 C.F.R. § 76.1003(a).

[541] 47 C.F.R § 76.1003(c)(4).

[542] 47 C.F.R § 76.1003(c)(1) & (d). *See also* Alliance for Community Media, et al, at 18 n.26.

[543] 47 C.F.R § 76.1003(h).

[544] 47 C.F.R § 76.1003(g).

[545] 47 C.F.R § 76.1003(r).

already exist for resolving certain types of disputes -- e.g., program access and must-carry -- that may come before the Commission under our open video system rules. Other disputes will be resolved pursuant to the principles and rules set forth in this Order.

240. We disagree with the proposal submitted by the Telephone Joint Commenters and NYNEX which states that a video programming provider or other complainant must show: (1) that an open video system operator intentionally treated it substantially differently from similarly-situated programming providers; (2) that the open video system operator's conduct was commercially unreasonable in the video programming business; and (3) that the complainant suffered actual and substantial commercial harm.[546] We agree with those commenters that argued that such a standard would place too heavy a burden on the complainant and would unduly favor open video system operators.[547] We believe that requiring a showing of intentional discrimination is unnecessary and often not amenable to direct proof. Moreover, a required showing that the conduct was "commercially unreasonable in the video programming business" would mean that it would be a complete defense for an open video system operator to assert, for instance, that a similarly situated cable operator might reasonably engage in the same conduct. Thus, the Telephone Joint Commenters' standard would effectively eviscerate Section 653's non-discrimination requirement.[548]

241. We have also decided not to adopt recommendations made by the State of New York and the City of Indianapolis urging that local disputes, such as disputes between local franchising authorities and open video system operators, be resolved on a local or state level.[549] Under Section 653(a)(2), the Commission has exclusive jurisdiction to resolve disputes arising under the open video system rules.

242. Finally, while we encourage parties to use ADR techniques to attempt to resolve their dispute without the Commission's direct involvement, we believe that a clause in a carriage agreement requiring ADR before a dispute could be brought to the Commission would not be a "just and reasonable" term or condition of carriage.[550] Such a requirement could delay an

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[546]*See* Telephone Joint Commenters Comments at 10; NYNEX Comments at 29.

[547]NAB Comments at 6; American Cable, et al. Reply Comments at 14.

[548]*See* MPAA Reply Comments at 7 (arguing that under the Telephone Joint Commenters' standard, an open video system operator could potentially justify any action as commercially reasonable); American Cable et al. Reply Comments at 14 (stating that the Commission's duty to protect the public interest would not be satisfied by resolving disputes based on a standard that allows operators to act according to their own business judgment).

[549] State of New York Comments at 11; City of Indianapolis Reply Comments at 2.

[550]Section 653(b)(1)(A). *See also* USTA Comments at 12 (advocating an initial private resolution requirement); NYNEX Comments at 30 (stating that the Commission should respect agreements between open video systems operators and video programming services providers to submit disputes to arbitration or mediation or any other commercially reasonable dispute resolution procedure). We support the New Jersey Ratepayer Advocate's contention

aggrieved party's right to redress significantly beyond the 180-day period mandated by Congress. In addition, permitting operators to require as a condition of carriage that all disputes be resolved through ADR, may lead operators to mandate ADR practices that give them an unfair advantage over complainants.[551] Since the use of ADR will be purely voluntary, we do not believe that negotiating parties will be able to use ADR as a strategy to delay the resolution of complaints.[552]

H. Joint Marketing, Bundling and Structural Separation

1. Notice

243. In the *Notice*, we asked whether open video system operators should be permitted to engage in the joint marketing and bundling of their video service, along with other services, such as local and interexchange telephone and data transmission services.[553] Certain commenters expressed concern over open video system operators engaging in joint marketing and bundling.[554] For instance, NCTA argued that joint marketing would give a telephone company an unfair marketing advantage deriving solely from its position as the monopoly supplier of an essential service.[555] Until local telephone service is "effectively competitive," NCTA proposed, an incumbent LEC should be required to provide the name, address and telephone number of the local cable operator if it wishes to market video services to customers calling to request telephone service.[556] Regarding bundling, AT&T, for instance, argued that where one of the products to be bundled is not competitive, such bundling can inhibit competition by allowing the monopoly provider to create bundled offerings that cannot be matched by providers of the competitive services.[557]

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that attempts should be made to resolve open video system disputes over PEG through ADR on a state or local level, provided that ADR is not mandatory. *See* State of New Jersey Ratepayer Advocate Comments at 4.

[551]For example, the operators may develop ADR procedures that permit only the operator to select the forum for ADR, mediators and/or arbitrators that may be unacceptable to an aggrieved party.

[552]*See* Assn. of Local Television Stations Reply Comments at 7 (suggesting that the parties notify the Commission as soon as discussions between them begin, so that the Commission can start the 180-day clock.)

[553]*Notice* at para. 66.

[554]*See* AT&T Comments at 3-4; Time Warner Comments at 17-18; NCTA Comments at 24-25; TCI Comments at 9-11; Cablevision Systems/CCTA Comments at 17-19; Rainbow Comments at 23-24; Comcast, *et al.* Comments at 9; Continental Comments at 15; Alliance for Community Media, *et al.* Reply Comments at 12; Cox Comments at 9.

[555]NCTA Comments at 24-25.

[556]*Id.* at 25.

[557]AT&T Comments at 3.

244. By contrast, some commenters argued that the Commission should not prohibit joint marketing and bundling because they provide the open video system operator with mechanisms to tailor services to meet the unique competitive and consumer needs of individual markets by providing consumers with a comprehensive package of communications services.[558] Moreover, USTA asserted that joint marketing and bundling are conveniences for consumers because they permit "one stop shopping."[559]

245. Similarly, some commenters argued that a separate subsidiary requirement is required by Section 272 of the 1996 Act and is necessary to protect against the dangers of discrimination and cross-subsidy by LECs.[560] According to one commenter, "the LEC will still have the incentive to cross-subsidize, [but] its ability to do so will be restrained" if the establishment of a separate subsidiary is required.[561] Other commenters, however, argued that a separate subsidiary requirement is not only unnecessary, but is contrary to both the plain language of the 1996 Act and the intent of Congress.[562]

[558]Telephone Joint Commenters Comments at 29-30; NYNEX Comments at 28-29; Telephone Joint Commenters Reply Comments at 36.

[559]USTA Reply Comments at 9

[560]NCTA Comments at 25-27 (arguing that a separate subsidiary is necessary to police discrimination and cross-subsidy, and is consistent with the Commission's authority under Section 272(f)(3) of the Communications Act); Rainbow Comments at 25-27 (arguing that structural separation will deter unlawful activity and that, for Bell operating companies, structural separation is mandated under Section 272(a)(2)(C), since the provision of video services is an "information service"); TCI Comments at 15-17 (same); Time Warner Comments at 10-13 (arguing that a separate subsidiary requirement would limit a LEC's ability to cross-subsidize its video services by preventing "hidden" transactions between its regulated and unregulated businesses); CCTA Reply Comments at 5; Continental Comments at 12; Rainbow Comments at 25-27; Time Warner Comments at 10-13; Alliance for Community Media, et. al Comments at 6-7; NARUC Comments at 5; NCTA Reply Comments at 24-25; Adelphia/Suburban Cable Reply Comments at 10-11; Time Warner Reply Comments at 5-6.

[561]Time Warner Comments at 11

[562]U S West Reply Comments at 5-7 (arguing that a separate subsidiary is not required because video programming qualifies as an "incidental interLATA service" under Section 272(a)(2)(B)(i) of the Communications Act); NYNEX Reply Comments at 6 n.13 (arguing that Section 653(c) provides that Title II will not apply to open video systems, and that Section 272(a)(2)(C), requiring a separate subsidiary for information services, is part of Title II, and that, even under Title II, video services would qualify under the exemption for incidental interLATA services in Section 272); Telephone Joint Commenters Reply Comments at 22-24 (arguing that a separate subsidiary requirement would inflate the cost of both open video and telephone service while adding nothing to the Commission's existing regulatory safeguards, and that video programming services are exempted from the separate subsidiary requirement under Section 272 of the Act)

2. Discussion

a. Joint Marketing

246. Section 653 is silent on the issue of joint marketing. The Act does, however, expressly impose joint marketing restrictions on telephone companies in other contexts.[563] Given that these Sections were all enacted as part of the 1996 Act, we find it a significant indication of Congress' intent that Sections 271(e), 272(g) and 274(c) contain express joint marketing restrictions while Section 653 does not.[564] Moreover, while NCTA argues that joint marketing restrictions should be imposed until the local telephone market is "effectively competitive," Section 272(g)(2) specifically sets a similar competitive condition on the lifting of the joint marketing restrictions between telephone exchange and interLATA services: a BOC's authorization under Section 271(d) to provide interLATA services in an in-region State. Again, no such condition was established in Section 653.

247. Since Congress chose not to adopt joint marketing restrictions in Section 653 even though (1) it specifically applied joint marketing restrictions to other provisions of the 1996 Act, and (2) it restricted joint marketing in some provisions of the 1996 Act until the introduction of competition in the local telephone market, we decline to adopt joint marketing restrictions here. We note, however, that any entity that offers any telecommunications service will be subject to both the customer proprietary network information ("CPNI") restrictions set forth in Section 222 of the Communications Act and any regulations the Commission establishes pursuant to Section 222.[565] Similarly, any provider of cable or open video service will be subject to the cable privacy restrictions set forth in Section 631.[566]

b. Bundling

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[563]For instance: (1) new Section 271(e) prohibits certain large interexchange carriers from jointly marketing telephone exchange service obtained under Section 251(c)(4) with interLATA services in a State until a Bell operating company ("BOC") is authorized pursuant to Section 271(d) to provide interLATA services in that State, or until 36 months have passed since the date of enactment of the 1996 Act, whichever is earlier; (2) new Section 272(g)(2) prohibits a BOC from marketing or selling interLATA services offered by its Section 272 affiliate within any of its in-region States until the BOC is authorized to provide interLATA services in that State under Section 271(d); and (3) new Section 274(c)(1) imposes certain joint marketing restrictions on BOCs engaging in electronic publishing. Communications Act §§ 271(e), 272(g)(2), 274(c)(1), 47 U.S.C. § 271(e), 272(g)(2), 274(c)(1).

[564]*See, e.g., Haas v. Internal Revenue Service*, 48 F.3d 1153, 1156 (11th Cir. 1995) ("Where Congress knows how to say something but chooses not to, its silence is controlling.") (citations omitted).

[565]Communications Act § 222, 47 U.S.C. § 222. Issues regarding the CPNI provisions of Section 222 of the Communications Act are currently being addressed in a Commission proceeding. *See Notice of Proposed Rulemaking*, CC Docket No. 96-115, released May 17, 1996 ("*CPNI NPRM*"). As noted in the *CPNI NPRM*, the Commission's CPNI requirements with respect to AT&T, the BOCs, and GTE remain in effect, pending the outcome of the rulemaking, to the extent that they do not conflict with Section 222. *CPNI NPRM* at para. 2.

[566]Communications Act § 631, 47 U.S.C. § 551.

248. Section 653 also does not address the issue of "bundling," which we define in this context to mean the offering of video service and local exchange service in a single package at a single price.[567] We would also treat as bundling the situation in which an entity offers one service at a discount if the customer purchases another service. We disagree with AT&T and Time Warner's concern that the bundling of telephone and video services will be anti-competitive, and increase the risk of cross-subsidization of the competitive service by the monopoly service.[568] We believe that the Commission's Part 64 cost allocation rules and any amendments thereto will protect adequately regulated telephone ratepayers from a misallocation of costs that could lead to excessive telephony rates.[569] However, we will impose certain safeguards to protect consumers in these circumstances. First, the open video system operator, where it is the incumbent LEC, may not require that a subscriber purchase its video service in order to receive local exchange service. Second, while the open video system operator may offer subscribers a discount for purchasing the bundled package, the LEC must impute the unbundled tariff rate for the regulated service.

c. Structural Separation

249. We disagree with those commenters that argue that a separate affiliate requirement nevertheless should be imposed pursuant to Section 272.[570] We believe that Congress' did not intend to impose a separate affiliate requirement on LECs providing open video service. First, Section 653 is silent on whether LECs and others must provide open video service through a separate affiliate. In fact, Congress expressly directed that Title II requirements not be applied to "the establishment and operation of an open video system" under Section 653.[571] In addition, Section 272 exempts "incidental interLATA services" from the separate affiliate requirement, and includes certain video programming services within the definition of "incidental interLATA

[567]*See* AT&T Comments at 3.

[568]*See* AT&T Comments at 2; Time Warner Comments at 17.

[569]*See* 47 C.F.R. §§ 64.901-904. *See also Notice of Proposed Rulemaking* in CC Docket No. 96-112, FCC No. 96-214 (released May 10, 1996).

[570]*See, e.g.*, TCI Comments at 15-17 and Rainbow Comments at 25-27 (arguing that a LEC providing open video service is engaged in the provision of an "information service" under Section 272(a)(2)(C)); NCTA Comments at 25-26 (arguing that the Commission can impose a separate affiliate requirement under Section 272(f)(3), which provides that the Commission retains its existing authority under other sections of the Act to prescribe safeguards consistent with the public interest, convenience and necessity).

[571]Section 653(c) provides that "[w]ith respect to the establishment and operation of an open video system, the requirements of this section shall apply in lieu of, and not in addition to, the requirements of Title II." Communications Act § 653(c)(3), 47 U.S.C. § 573(c)(3). *See also* NYNEX Reply Comments at 6, n.13.